IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC07-403

STEVEN DAMICO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The facts from the opinion of the Fourth District Court of Appeal are as follows. Damico v. State, 940 So. 2d 608 (Fla. 4th DCA 2006).

> Appellant, Steven Damico, appeals a final judgment and conviction for aggravated battery. Damico was charged with attempted first degree murder under the firearms enhancement statute. Following a jury trial, Damico was convicted of the lesser included offense of aggravated battery and sentenced to twenty-five years in prison. Damico raises eight points in this appeal, but we write to address only one of these issues, whether aggravated battery is a permissive lesser included offense of attempted first degree murder with application of the firearms sentencing enhancement statute. Damico argues that aggravated battery, with application of the firearms enhancement statute, results in the same sentence as attempted first degree murder and therefore is not a permissive lesser included offense.

The Fourth District Court of Appeal reviewed one issue. The court simply distinguished the facts in the present case from Franklin v. State, 877 So. 2d 19 (Fla. 4th DCA 2004) and stated:

> In this case, with application of the 10-20-life statute, the maximum punishment for attempted first degree murder is life imprisonment, while aggravated battery is punishable by 25 years to life imprisonment. See §§ 775.087(1)(2), Fla. Stat. (2001). Damico was ultimately sentenced to 25 years in prison. We find that a sentence of 25

years to life is a lesser sentence than life, and therefore, aggravated battery is both lesser in degree and punishment than attempted first degree murder. We affirm.

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction to review the instant case because the opinion of the Fourth District Court of Appeal is not in conflict with the decision of this court in Sanders v. State, 944 So. 2d 203 (Fla. 2006).

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS NOT IN CONFLICT WITH SANDERS v. STATE, 944 So. 2d 203 (Fla. 2006)

Petitioner contends that the Fourth District's decision in Damico v. State, 940 So. 2d 608 (Fla. 4th DCA 2006) is in conflict with the decisions of this court in Sanders v. State, 944 So. 2d 203 (Fla. 2006). The State of Florida asserts that conflict does not exist.

In order for two decisions to be in express and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court as mandatory authority. See generally Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Mancini v. State, 312 So. 2d 732 (Fla. 1975). The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the earlier

decision. Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). However, "[if] the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict cannot arise." Id. at 887. Damico is not in conflict with Sanders or any other of the decisions petitioner broadly cites in the brief on jurisdiction.

Petitioner's argument, made repeatedly in the brief on jurisdiction, is that the Fourth District erred in finding that aggravated battery was a lesser included offense of attempted first degree murder based on the allegations in the information. Petitioner also argues that the Fourth District redefined what is meant by a permissive lesser included offense. These issues do not present a basis for this court to accept jurisdiction as the issues were not written about or discussed in the opinion of the Fourth District Court of Appeal.

Damico cannot be in conflict with Sanders v. State, 944 So. 2d 203 (Fla. 2006) as the opinion below contains very few facts. Petitioner attempts to overcome the lack of facts in the decision by extensively referencing facts, from the record on appeal below, that do not appear in the decision. For example, petitioner makes numerous references to the information and the

elements alleged in the information. The opinion does not mention the information or the elements alleged in the information. The record cannot be reviewed to determine if conflict jurisdiction exists. See Hardee v. State, 534 So. 2d 706, 708 n.* (Fla. 1998) ("[F]or purposes of determining conflict jurisdiction, this Court is limited to the facts which appear on the face of the opinion."); Reaves v. State, 485 So. 2d 829 (Fla. 1986)(“Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.”)

Additionally, petitioner also makes several legal arguments, citing case law, that would be appropriate in a merits brief but such arguments add nothing to a jurisdictional brief which suggests conflict exists between cases. The sole case that appellant specifically cites as being in direct conflict with Damico is this court’s recent opinion in Sanders v. State, 944 So. 2d 203 (Fla. 2006). Damico is not in conflict with Sanders. The holding in Damico is consistent with and properly applies Sanders.

In Damico the Fourth District reviewed their decision in Franklin v. State, 877 So. 2d 10 (Fla. 4th DCA 2004), review

pending, case no. SC04-1523 (Fla.), and concluded Franklin was distinguishable. In Damico the defendant was tried for attempted first degree murder and the jury convicted him of the lesser included offense of aggravated battery. The Fourth District concluded that since the sentence for the lesser included offense was 25 years to life with the firearm enhancement, Franklin did not apply because the 25 year to life sentence was a lesser sentence than the life sentence that would have been imposed for a conviction of the charged crime of attempted first degree murder. The conclusion of the Fourth District was consistent with the holding in Sanders where this court found that aggravated battery was a lesser included offense of second degree murder, even where the trial judge imposed a sentence for the lesser offense equal to the maximum available for the charged crime. This court stated: "Because the lesser included offense here meets the definition of a lesser included offense, we find that it comports with our existing jurisprudence, especially since the trial judge here had the discretion to impose a lesser penalty." Sanders at 207. Indeed, Damico correctly follows and is consistent with Sanders.

This court should decline to accept discretionary jurisdiction as there is no conflict presented.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, The State of Florida respectfully requests this Court decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief of Jurisdiction" has been furnished by mail to: Sheldon M. Shapiro, Esquire, 800 S.E. 3rd St., Suite 300, Ft. Lauderdale, FL. 33316 on March_____2007.

_____
Don M. Rogers

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type.

_____

Don M. Rogers

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RESPONDENT'S APPENDIX

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